ADULFAST ANTHONY ROBERT & ANOR.

v.

WANGSA TIMBER INDUSTRIES SDN. BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CIVIL SUIT NO. K22-178 OF 1994]
13 MARCH 1995

INJUNCTION: *Easement - Claim to equitable right of way - Plaintiffs' access to driveway impeded by construction works undertaken by defendant - Whether s. 31(1)(d) Sabah Land Ordinance read with ss. 3(1) & 6 Civil Law Act 1956 precludes the application of common law principles of equity in Sabah - Defendant having knowledge of use of common driveway - Whether claim of easement binding on the defendant - Whether there were serious questions to be tried - Balance of convenience - Whether damages an adequate remedy - When mandatory injunctions should be granted - Question of what is the status quo to be preserved pending trial.*

LAND LAW: *Claim to easement - Equitable right of way - Conditions to be satisfied - Whether applicable in Sabah - Consideration of s. 31(1)(d) Sabah Land Ordinance read with ss. 3(1) & 6 Civil law Act 1956.*

The plaintiffs were the registered co-owners of a parcel of land (dominant tenement) purchased in 1981 which consisted of a detached house, a garden and a garage. Adjacent to the dominant tenement was another parcel of land (servient tenement) with a house thereon which the defendant purchased on 20 April 1992. The plaintiffs enjoyed access to and from the dominant tenement along a driveway that passed through the servient tenement and the plaintiffs were never denied access therethrough by the previous owners. In March 1994, the defendant commenced piling and site works to construct a house which impeded the plaintiffs' access to the driveway.

On 17 November 1994, the plaintiffs filed an *ex parte* application for an injunction to restrain the defendant from carrying out the said works on the servient tenement which was granted by the Court. On 25 November 1994, the plaintiffs applied *inter partes* for extension of the said injunction and also prayed for a mandatory injunction that the defendant restore the portion of the driveway already demolished to allow vehicular access to the plaintiffs' house in the dominant tenement.

Learned Counsel for the defendant submitted that the claim for equitable right of way was not available in Sabah by virtue of s. 31(1)(d) of the Sabah Land Ordinance (the Ordinance) read with ss. 3(1) & 6 of the Civil Law Act 1956 (CLA). Learned Counsel further submitted *inter alia* that there were no serious questions to be tried as the plaintiffs had no valid interest in the defendant's land. He argued that the building plans had been approved by the relevant authorites and part of the plaintiffs' garden, drain, wall, stairs and driveway encroached onto the servient tenement; which information had been conveyed to the plaintiffs with a request for them to use the actual right of way granted to them as endorsed in the title deed. Learned Counsel claimed the defendant was unaware of the plaintiffs' alleged right of way and further that any hardship or inconvenience to the plaintiffs, which was denied, could be adequately compensated by damages.

Held:

[1] The issue of whether s. 31(1)(d) of the Ordinance and ss. 3(1) and 6 of the CLA does or does not preclude the application of common law principles and equity relating to an easement of right of way in Sabah raises a serious issue to be tried.

[2] The defendant purchased the servient tenement on 20 April 1992 but only commenced construction works in March 1994. As a prudent purchaser he would have very likely made enquiries from the vendor and neighbours about the use of the common driveway and in the interim period, the defendant must have been aware that the occupiers of the dominant tenement were using the common driveway. Therefore the defendant's contention that he had no knowledge of the use of the said driveway is difficult to accept and there is a serious question to be tried on whether the claim of an easement of right of way binds the defendant.

[3] The plaintiffs were in actual use of the driveway at the time the acts complained of took place and the deprivation of this use was a direct inconvenience to the plaintiffs with immediate consequence whereas the defendant was trying to prevent that use not because of inconvenience but because of an alleged legal right. Accordingly, the balance of convenience lies in favour of the plaintiffs rather than the defendant.

[4] Although a right of way has been endorsed on the title, that was never used because it was inaccessible in view of the contour of the land. If the common driveway is demolished, the plaintiffs' land will diminish in value as there will be loss of direct access by car to the plaintiffs' house. Further the plaintiffs will suffer anxiety as to the safety of the house in the event of an emergency. In the event that the plaintiffs succeed at the trial, damages will not be an adequate remedy as there is no other access except for the driveway through the servient tenement.

[5] Mandatory injunction is only granted in exceptional and extremely rare cases. In the instant case the injunction obtained on 17 November 1994 has been too late to prevent the demolition of a major part of the driveway and there is an urgent need for the driveway to be restored as the plaintiffs are suffering inconvenience and great hardship. In the circumstances this is a case whereby an interlocutory mandatory injunction should be granted.

[6] The *status quo* to be preserved should be the existence of the driveway before it was partly demolished and not after the excavation of the driveway as submitted by the defendant.

[Plaintiffs' application granted with costs subject to the plaintiffs' undertaking as to damages].

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 ALL ER 504 ***(foll)***
Lian Keow Sdn. Bhd. v. Overseas Credit Finance Bhd. [1982] 2 MLJ 162 ***(foll)***
Datuk Syed Kechik v. Dato Yeh Pao Tzu [1977] 1 MLJ 56 ***(foll)***
Fellowes v. Fisher [1975] 2 ALL ER 829 ***(foll)***
Tam Kam Cheong v. Stephen Leong Kon Sang & Anor. [1980] 1 MLJ 36 ***(foll)***
Tan Wee Choon v. Ong Perk Seng [1986] 1 MLJ 322 ***(not foll)***
Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd & Anor. [1967] 2 MLJ 104 ***(cit)***
Bhagwan Singh & Co. Sdn. Bhd. v. Hock Hin Bros. Sdn. Bhd. [1987] 1 MLJ 324 ***(cit)***
Tee Than Song v. Caltex Oil Malayasia Ltd. [1970] 1 MLJ 68 ***(refd)***
Thomson v. Park [1944] 2 ALL ER 477
Verrall v. Great Yarmouth Borough Council [1980] 1 ALL ER 839 ***(refd)***
Lim Hean Pin v. Thean Seng & Co. Sdn. Bhd. [1992] 2 MLJ 10 ***(foll)***
Chan Jen Chiat v. Allied Granite Marble Industries Sdn. Bhd. [1994] 3 MLJ 495 ***(foll)***
Wah Loong (Jelepang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok [1975] 2 MLJ 111 ***(foll)***

Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150 ***(foll)***
Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors. [1992] 1 MLJ 487 ***(foll)***

Legislation referred to:
Civil Law Act 1956, ss. 3, 3(1), 3(1)(b) & (d) & 6
National Land Code, s. 282
Sabah Land Ordinance, ss. 31(1)(d) & 41(2)

For the plaintiffs - Clement Skinner (Maureen Sinsua with him), M/s Skinner, Lind, Willie Wong & Chin
For the defendant - Marina Tiu; M/s. Yap Chin & Tiu

JUDGMENT

Tee Ah Sing JC:

On 6 March 1995 I granted an extension to the order for interim injunction dated 17 November 1994 obtained by *ex-parte* summons in chambers application dated 17 November 1994 and also a mandatory order that the defendant whether by themselves, their servants agents or otherwise howsoever do restore that portion of the driveway which has been demolished on the servient tenement to allow vehicular access to the plaintiffs' house in the dominant tenement. I indicated that I would give my reasons at a later date and this I now do.

On the plaintiffs' *ex-parte* summons in chambers which was heard on 17 November 1994, I granted the following orders.

1. The defendant whether by themselves, their servants, agents or otherwise howsoever be restrained from doing any acts or deeds that would impede or deny the plaintiffs access to the dominant tenement held under CL 015276418 through the servient tenement held under CL 015276409 by using the existing driveway or any part thereof or doing any act to damage or demolish the existing driveway on the servient tenement.
2. That the plaintiffs undertake to abide by any order of the Court or Judge may make as to damages in case the Court or Judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the Orders sought herein which the plaintiffs ought to pay.
3. That the cost of this application be paid by the defendant.

The said application is supported by the affidavit-in-support of Adulfast Anthony Robert, the co-plaintiff affirmed on 16 November 1994 (the first affidavit). The material part of the first affidavit are as follows:

1. I am a co-plaintiff in this action and am duly authorised by the other plaintiff, who is my wife to make this affidavit. I depose to facts herein from my own knowledge and from documents and records I have been shown and read save where the contrary is stated.
2. I and my wife are the present registered co-owners of a parcel of land held under CL 015276418 (hereinafter referred to as "dominant tenement") which I purchased in 1981 from one Datuk Thomas Chow Shee Seng. The dominant tenement has a detached house built thereon including a garden and garage for one (1) car.
3. The dominant tenement is situated adjacent and next to a parcel of land held under CL 015276409 (hereinafter referred to as the "servient tenement") on which was built a house and presently owned by the defendant.

4. I obtain access to and from the dominant tenement along a driveway that passes through the servient tenement. This has been the case since I personally entered into occupation of the dominant tenement in 1981. At that time the servient tenement was owned by Mr. Liu Kai who then in 1983 sold the servient tenement to one Datuk Frederick Jinu who then in June 1992 sold the servient tenement to the defendant. During the ownership of Liu Kai and Datuk Frederick Jinu I experienced no difficulty with the use of the driveway leading through the servient tenement. I was never once denied access there through whilst I was in occupation.

5. I had rented out my house on the dominant tenement to one Mrs. Soon who sometime in March 1994 informed me that the defendant had marked out red lines over the driveway leading to my car porch on the dominant tenement and part of the garden and drain on the dominant tenement. Mrs. Soon was also informed that the red lines indicated encroachment on the servient tenement and that she should refrain from using the driveway. As a result of this Mrs. Soon terminated her tenancy and moved out of my house on the dominant tenement.

6. I then returned from Australia in March 1994 and took over my house and then began to make enquiries as regards the alleged encroachment as I observed that the house on the servient tenement had been demolished and piling and site works were going on in the servient tenement. These works were causing me some difficulty in using the access driveway. I went to the Kota Kinabalu Municipal Council (hereinafter referred to as "KKMC") to see the President and inform him of my difficulty and he told me that an architect had applied for building plans for approval on the servient tenement but that the KKMC had not approved any obstruction of the access road.

7. As a result I wrote to the architect concerned on the 23 March 1994 through my former solicitors complaining of the interference to my access to the dominant tenement. It is now shown to me and annexed hereto marked "AAR1" a copy of the above letter. As a result of this the driveway was not obstructed any longer.

8. About one (1) week later, I received a phone call from one Peter Yong inviting me to a meeting with the architect and the defendant. I attended and was told that part of my garden, drain, wall and stairs was encroaching onto the defendant's land, that the driveway leading to the dominant tenement was also an encroachment and that I should seek an alternative access as a driveway. In reply I informed them I had been enjoying access using the driveway since 1981 when I bought the dominant tenement and so was the position of the garden, wall, drain and stairs.

9. About three (3) weeks later, the access driveway was again blocked so I again wrote to the KKMC complaining. It is now shown to me annexed hereto marked "AAR2" a copy of my solicitors letter dated 19 May 1994. As a result the driveway was opened to me again.

10. As a result of the ongoing activity and the servient tenement and my belief that the defendant had not obtained planning permission to undertake such works I wrote two (2) letters to the defendant's architect on 29 June 1994 and 7 July 1994. It is now shown to me annexed hereto marked "AAR3" and "AAR4" copies of the above letters.

11. Sometime in late July or early August 1994, I went to the Land & Survey and saw the Assistant Collector of Land Revenue regarding my problem and was then informed that my access driveway ran over the servient tenement and so did part of my garden, drain and wall.

12. On becoming so aware I contacted Datuk Thomas Chow who informed me that the access driveway over the servient tenement along the route it now takes was built with the agreement of the then owners of both the dominant and servient tenement to be used as a common right of way. Datuk Chow explained to me that the dominant tenement had actually obtained a right of way over the servient tenement measuring an area of some 25 links by 30 links and marked out over the servient tenement as a right of way but this right of way was not suitable as it was far to steep to build an access road on it. This position has been confirmed in writing by both Datuk Chow and Mr. Tam Wing Lim the then owners of the dominant and servient tenement. It is now show to me annexed hereto marked "AAR5" and "AAR6" a copy of the letter from Datuk Chow dated 12 September 1994 and from Mr. Tam Wing Lim dated 30 September 1994 on the above.

13. I have also on 9 August 1994 written to the Permanent Secretary of the Natural Resources Department formally applying for a right of way along the route now being used as my access driveway. I await a reply thereto. It is now shown to me annexed hereto marked "AAR7" a copy of my letter.

14. Sometimes on 14 October 1994 I was invited to the KKMC to attend a sub-committee meeting on building and development where I aired my grievance regarding the problem faced by me regarding access as well as the other encroachment complained of. The sub-committee informed me they will look into my complaint and I was requested to attend a meeting scheduled for 3 November 1994. However before this date, I received a letter from the defendant's solicitors, Messrs. Wong Law & Ti of Kuantan dated 20 October 1994 wherein the owners of the servient tenement indicated in no uncertain terms that they will demolish the existing road on the servient tenement and that we should seek new passage to our land. It is now shown to me annexed hereto marked "AAR8" a copy of the aforementioned solicitor's letter.

15. On receipt of the abovementioned letter I sent a copy to the KKMC President who in turn instructed his officers to provide me with the details of the planning application of the defendant so that I could counter the allegations. It is now shown to me annexed hereto marked "AAR9" a copy of my letter to the President KKMC and his instructions endorsed thereon.

16. In the meantime, on 5 November 1994, my present solicitors wrote to the defendant's solicitors requesting fourteen (14) days to look into this matter and in the meantime not to take any action to demolish my access way. It is now shown to me annexed hereto marked "AAR10" a copy of my solicitor's letter.

17. Following such directive I met the engineer of the KKMC who then directed me to see a building inspector on 7 November 1994 to provide me a copy of the development and building plans of the defendant. I was also provided with the layout and contour plan for original subdivision of CL 26214 of which lot 4 represents the servient tenement and lot 5 is the dominant tenement. It is now shown to me annexed hereto marked "AAR11(a)" and "AAR11(b)" a copy of the building plans and "AAR12(a)" and "AAR12(b)" a copy of the subdivision plans.

18. The 7 November 1994 was the first occasion on which I became aware of the approval granted to the defendants in respect of their building plans.

19. On 8 November 1994 the defendant's solicitors replied that the defendants would only agree to stay their action for ten (10) days. It is now shown to me annexed hereto marked "AAR13" a copy of the defendant's solicitor's letter.

20. In the meantime the defendant continued with excavation works which removed my drain and fence complained of. As a result my solicitors wrote to the defendant's solicitors on 11 November 1994 requesting immediate stoppage of excavation works. It is now shown to me annexed hereto marked "AAR14" a copy of my solicitor's letter.

21. On 12 November 1994 the defendant's solicitors wrote back informing us that the defendants would not stop works on their land. It is now shown to me annexed hereto marked as "AAR15" a copy of the defendant's solicitor's letter.

22. On the same day our solicitors replied requesting the defendant not to impede our access to the dominant tenement, as at the date, we could still drive home, but just. It is now shown to me annexed hereto marked "AAR16" a copy of my solicitor's letter.

23. On 15 November 1994 at about 2.00 p.m. the defendant began to drill through the concrete of the access driveway leading to the dominant tenement. I fear that unless immediately restrained there will be no driveway left.

24. I will suffer great hardship and inconvenience if my present access is taken away as the land on which the dominant tenement is situated is much higher than the servient tenement and it would be almost impossible to build an alternative access road along the right of way marked out over the servient tenement. I am now in the process of finding alternative accommodation in case I cannot gain access to my house.

25. I undertake to abide by any award as to damages that the Court may make in granting the order herein sought.

26. I wish to state that:

(a) I have not given any notice of this application to the defendant but my solicitors have already indicated to the defendant's solicitors that I would seek legal redress if my access was further impeded. The threatened works of demolishing my driveway have just commenced and it might be too late to restrain unless I act now;

(b) I believe the defendant will assert in reply to this application as well as to my action that I do not have any right to claim an easement of right of way as the same is not endorsed on their title and/or that for the reasons stated in their solicitor's letter of 20 October 1994 (annexure "AAR8" herein) and the fact that as they have an approved development and building plan, they have every right to do what they are now doing;

(c) I do not know of facts that might lead this Court not to grant me the relief sought *ex-parte*;

(d) no similar *ex-parte* application has been made to any other Judge;

(e) the relief I seek by this application is for an order that the defendant whether by themselves, their servants, agents or otherwise howsoever be restrained from doing any acts or deeds that would impede or deny me access to the dominant tenement through the servient tenement by using the existing driveway or any part thereof or doing act to damage or demolish the existing driveway on the servient tenement.

On 25 November 1994 the plaintiffs filed an *inter partes* summons in chambers and prays for the following reliefs:

1. an extension to the order for interim injunction dated 17 November 1994 obtained by *ex-parte* summons in chambers application dated 17 November 1994;

2. a mandatory order that the defendant whether by themselves, their servants, agents or otherwise howsoever do restore that portion of the driveway which has been demolished on the servient tenement to allow vehicular access to the plaintiffs' house in the dominant tenement;

3. the plaintiffs undertake to abide by any order the Court or Judge may make as to damages in case the Court or Judge should hereafter be of the opinion that the defendant shall have sustained any damages by reason of the orders sought herein which the plaintiffs ought to pay;

4. that the cost of this application be paid by the defendant.

This summons-in-chambers is supported by the affidavit of Adulfast Anthony Robert affirmed on 24 November 1994 (the second affidavit) and also the first affidavit. The material parts of the second affidavit are as follows:

2. In now applying to extend the injunction granted on 17 November 1994 I wish to rely on the facts stated in my earlier affidavit and the exhibits therein, affirmed on 16 November 1994, supporting the *ex-parte* summons in chamber application from which I had obtained an order.

3. The following are facts which have occurred after the order for interim injunction was granted and served on the defendant.

4. After obtaining the order for interim injunction the same was served at about 4.40 p.m. on the defendant. By then most part of the driveway had apparently been demolished and this has been confirmed by the defendant's solicitor in Kota Kinabalu, Messrs. Yap Chin & Tiu, *vide* their letter dated 19 November 1994. It is now shown to me and annexed hereto marked "AAR17" a copy of the said letter.

5. The width of the driveway now is so narrow and is completely inaccessible to any vehicles and we have to park our car at the bottom of the hill and walk our way up through a steep slope to reach our house. I have taken photographs of the works that was carried out by the defendant, including the demolished driveway and it is now shown to me and annexed hereto marked "AAR18" copies of the said photographs.

6. A subsequent letter also deleted 19 November 1994 from the defendant's solicitors in Kota Kinabalu had instructed us to remove our plants and staircase within seven (7) days as the defendant intends to excavate part of our garden and level the area to the same level as the servient tenement and to erect a retaining wall along the boundary line. It is now shown to me and annexed hereto marked "AAR19" a copy of the said letter.

7. In reply thereto our solicitors by a letter dated 22 November 1994 made a request to the defendant to restore the driveway to our house and also informed the defendant that their intended actions would destabilise the slope along the boundary line and this is in turn will adversely affect our property. Our solicitors have also requested for any

plans or studies which have been requested carried out relating to the defendant's intended actions. It is now shown to me and annexed hereto marked "AAR20" a copy of the said letter.

8. Since obtaining the injunction on 17 November 1994 but which has been too late to prevent the defendant from doing what we have feared they would do, I have in an attempt to seek further relief submitted a formal application to the Assistant Collector of Land Revenue for a right of way pursuant to the Sabah Land Ordinance. We had withheld submitting this formal application even though our solicitors had drafted it on 14 November 1994 in the hope that the injunction would have been sufficient to prevent the loss of our access. It is now show to me annexed hereto "AAR21" a copy of our solicitors' letter submitted on 22 November 1994 to the Assistant Collector of Land Revenue.

9. I am now suffering great hardship and inconvenience since my only access is taken away and I have expressed my fears to the defendant through our solicitor's letter dated 22 November 1994 (see "AAR20"), that in the event of any emergency arising like a fire, it would be impossible for the fire brigade to have access to my house and render the necessary assistance and this can put my family members' lives at risk.

10. I wish to state that:

(a) Since the driveway through the servient tenement is a way of absolute necessity and the only access to my house and that the surrounding area is not conducive for a right of way to be constructed I verily believe that no amount of damages will be an adequate remedy for my claim;

(b) By this application I seek from this Honourable Court an Order that the defendant whether by themselves, their servants, agents or otherwise howsoever be restrained from doing any acts or deeds that would impede or deny me access to the dominant tenement through the servient tenement by using the existing driveway or any part thereof or doing act to damage or demolish the existing driveway on the servient tenement.

(c) Further and/or in the alternative, I also seek a mandatory order that the defendant whether by themselves, their servants, agents or otherwise howsoever do restore the portion of the driveway that has already been demolished to allow vehicular access to our house.

11. I undertake to abide by any award as to damages that the Court may make in granting the orders herein sought.

Peter Ong King Hoo, the managing director of the defendant company affirmed an affidavit in reply on 9 January 1995. In this affidavit in reply the deponent prays that the plaintiffs' *inter partes* summons in chambers dated 25 November 1994 be dismissed with costs.

The relevant parts of this affidavit in reply are as follows:

1. I am a businessman by occupation and the managing director of the defendant and am duly authorized by the defendant to make this affidavit on their behalf.

2. I depose to the facts herein from my own knowledge and from documents and record I have been shown and read save where the contrary is stated.

3. I crave leave of this Honourable Court to refer to the affidavit of Adulfast Anthony Robert sworn to on 24 November 1994 and filed in support of the plaintiffs' application dated 25 November 1994 and the affidavit also of Adulfast Anthony Robert sworn to on 16 November 1994 and referred to in the 25 November affidavit. The said affidavits shall hereinafter be referred to as "the plaintiffs' affidavit".

4. On or around 20 April 1992, the defendant agreed to purchase from one Datuk Fredrick Jinu the parcel of land comprised in Country Lease No. 015276409 (hereinafter referred to as "the defendant's land") for the purchase price of RM200,000. It is now produced and shown to me a copy of the sale and purchase agreement dated 20 April 1992 and the same is hereto annexed and marked as Exhibit "PO1".

5. I made a search on the title to the said land and found that aside from a right of way registered under Memorial No. 87163 over the south-eastern tip of the said land measuring approximately 25 links by 30 links in favour of the neighbouring land Country Lease No. 015716418 (hereinafter referred to as "the plaintiffs' land"), there were no encumbrances on the said land. It is now produced and shown to me a copy of the relevant titles deed and agreement for right of way registered in the Central Land Registry and the same is hereto annexed and marked as Exhibit "PO2(a)" and "PO2(b)" respectively.

6. (a) Having been satisfied by the search, the defendant completed the purchase by paying the purchase price and lodging the relevant memorandum of transfer. It is now produced and shown to me a copy of the said memorandum of transfer dated 16 June 1992 and the same is hereto annexed and marked as Exhibit "PO3".

(b) The transfer was registered on 19 June 1993 under Memorial No. 10274693.

7. Subsequently, the defendant appointed an architect, Mr. Edward Yong of Messrs. Akitek Design Group in respect of the construction of a house on the defendant's land. The relevant building plan exhibited as AAR12(a) and AAR12(b) in the plaintiffs' affidavit sworn on 16 November 1994, was approved on 28 March 1994. It is now produced and shown to me a copy of the letter of approval dated 28 March 1994 and the same is hereto annexed and marked as Exhibit "PO4".

8. (a) In the course of the preparation of the plan, the defendant caused the defendant's land to be surveyed.

(b) The survey when completed showed that:

(1) The plaintiffs' garden encroached on the north-eastern part of the defendant's land;

(2) the driveway leading to the plaintiffs' land was in fact on the defendant's land, and

(3) the plaintiffs' garage and part of their house also encroached on the road reserve and on another adjoining land. it is now produced and shown to me a copy of the said survey plan and the same is hereto annexed and marked as Exhibit "PO5".

9. I informed the occupant of the land of the encroachment on the said land and requested them to use the actual right of way granted to them. I informed them that I was proceeding to develop the defendant's land in accordance with the approved plans.

10. (a) Upon being notified by the aforesaid architect sometime in March 1994 of the letter Exhibit AAR1 of the plaintiffs' affidavit sworn on 16 November 1994, I decided to attempt to settle the matter amicably and instructed Mr. Peter Yong of Messrs. Jayasuriya Kah & Co. to arrange a meeting with the plaintiffs.

(b) During the meeting, I proposed to the first plaintiff that they use the actual right of way granted to them. I even showed a way as to how the access to the plaintiffs' house using the registered right of way can be done by cutting down the registered right of way marked A and shaded red in the Exhibit 'PO5' to the same level as the defendant intend for their land, that is, 12 feet from 20 feet, and using the area marked A as his garage with the approach as shaded in blue. A stair case would then lead to his house from the new garage.

(c) I am informed by my contractor, Mr. Chee Yin Fah of Syarikat Woodline Transport that the estimated costs of such construction would be in the region of RM30,000 only and that he had informed the first plaintiffs of the costs. The first plaintiff however rejected the proposal even though I pointed out to him that he has no space in his land for garage as can be seen from Exhibit 'PO5'.

(d) I explained to the first plaintiff that he had to remove his encroaching garden and that the defendant would build a retaining wall at the boundary to support the plaintiffs' land.

(e) The first plaintiff refused my suggestions and insisted on the use of the encroaching driveway.

11. Thereafter, I continued with the construction of the defendant's house which construction necessitated the dismantling of the driveway and the excavation on the defendant's land.

12. The defendant was served a copy of the interim injunction on 17 November 1994 by which time the defendant had already excavated the driveway as stated in the Exhibit AAR17 of the plaintiffs' affidavit sworn to on 24 November 1994.

13. The defendant was at all material times *bona fide* purchaser for value. Until the completion of the survey of the defendant's land, the defendant was unaware of the plaintiffs' alleged right of way (which is denied). In fact, the right of way actually endorsed in the title led the defendant to believe that the right of way was as stated on the title deed.

14. I am advised and verily believe that there is no serious questions to be tried in the suit herein that:

(a) the plaintiffs have no valid interest on the defendant's land;

(b) the plaintiffs have in fact been granted a right of way as aforesaid and cannot insist on the right of way more convenient for them at the defendant's loss and hardship; and/or

(c) even if which is denied the plaintiffs do have a recognised interest on the defendants land, their failure or omission to give notification of such interest on the title deed to the defendant's land precludes them from now insisting on that right as against the defendants.

15. (a) The defendant has entered into contracts with their sub-contractors for the earth work and structural work in accordance with the plan and any stoppage of the works would make the defendant liable to penalty at the rate of RM1,640 a day. In fact, as at 18 December 1994 the defendants have incurred a penalty of RM49,200. It is now produced and shown to me a copy each of the contract dated 24 August 1994 and the invoice dated 19 December 1994 and the same are hereto annexed and marked as Exhibits "PO6(a)" and "PO6(b)".

(b) I verily believe that the plaintiffs are not in the position to pay any damages that the defendant may sustain by reason of the granting of the injunction or that any judgment in the defendant's favour would be rendered nugatory in that the plaintiffs have in fact migrated to Australia with their family some years back.

16. I further verily believe that the plaintiffs are not suffering great hardship and inconvenience as they alleged in that:

(a) as admitted in para. 5 of the affidavit of Adulfast Anthony Robert sworn to on 16 November 1994, the plaintiffs did not in fact occupy the house but were letting it out.

(b) I am informed by my said contractor that contrary to the first plaintiff's averment that his family had prior to March 1994 not lived at all in the house as they had migrated to Australia as aforesaid.

(c) The plaintiffs' had only started to live intermittently in the house after the dispute on the driveway started.

(d) As at the signing hereof, the only person seen at the house is the plaintiffs' son.

(e) The plaintiffs' house would still be accessible to any fire engine in the event of fire as the said fire engine could still drive close enough to the plaintiffs' house using the defendant's land.

17. I therefore verily believe that any alleged inconvenience to the plaintiffs which is denied can be adequately compensated by damages.

18. The defendants are in a sound financial position and is well able to pay any damages that the plaintiffs may suffer arising from the refusal of their application herein. It is now produced and shown to me copies of the relevant pages of the defendants audited account ending 31 March 1994 and the same is hereto annexed and marked as Exhibit "PO7".

19. I am authorized by the defendants to give an undertaking on their behalf to abide by any order of the Court as to damages that the plaintiffs may sustain and which the defendant may be liable to pay.

20. In the premises, I pray that the plaintiffs' application herein be dismissed and that the interim injunction granted on 30 November 1994 be dissolved with costs.

Based upon the foresaid affidavits and after hearing the submissions of both Counsel I have to consider whether the Court should grant an interlocutory mandatory injunction.

The principle governing the granting of an interlocutory injunction are set out in the following cases.

1. *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 ALL ER 504.

2. *Lian Keow Sdn. Bhd. v. Overseas Credit Finance Bhd.* [1982] 2 MLJ 162.

3. *Datuk Syed Kechik v. Dato Yeh Pao Tzu* [1977] 1 MLJ 56.

In the case of *Datuk Syed Kechik v. Dato Yeh Pao Tzu* [1977] 1 MLJ 56 at p. 60 His Lordship Yusoff J (as he then was) said:

> The principle of law governing application for interlocutory injunction laid down in *Stratford v. Lindley* [1965] AC 269 has now superseded by the recent decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 ALL ER 504. According to the latter case, the question is no longer whether the plaintiff has made out a *prima facie* case but, whether there is a serious question to be tried. If there is, the *status quo* must be preserved. Lord Diplock in delivering judgment of the House in that case said - p. 510:
>
> > The use of such expression as 'prohibitory', 'a *prima facie* case' or 'a strong *prima facie* case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious: in other words, that there is a serious question to be tried." "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

The procedure in the application of the principle in *American Cyanamid's* case is fairly summarised by Sir John Pennycuick in *Fellowes v. Fisher* [1972] 2 ALL ER 829 at p. 843 as follows:

> (1) Provided that the Court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case.
>
> (2) The Court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.
>
> (3) 'As to that' the Court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted.
>
> (4) If damages would not provide on adequate remedy the Court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction.
>
> (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even being preservation of the *status quo*. By the expression '*status quo*' I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief.
>
> (6) Finally, and apparently only when the balance still appears even, 'it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.'

Relying on the aforesaid authorities I would now have to first consider whether there is a serious question to be tried.

From para. 12 of the first affidavit it is clear that the plaintiffs' predecessor-in-title Datuk Thomas Chow and the defendant's predecessor-in-title Mr. Tam Wing Lim had agreed that the access driveway over the defendant's land was built with the agreement of both Datuk Thomas Chow and Mr. Tam Wing Lim to be used as a common right of way since 1968.

In Exhibit "AAR5" and "AAR6" it was also stated that the right of way measuring 25 links by 30 links was marked on the land title as per memorial No. 87163 dated 15 September 1966. However they were unable to use the right of way as indicated on the land title as it was inaccessable in view of contour of the land.

Learned Counsel submitted that since 1968 who ever the owners of the dominant tenement have been obtaining access to their land by using the common driveway over the servient tenement i.e., has been a continuous one for about 30 years.

In Exhibit "AAR8" dated 20 October 1994 last paragraph states "we are also instructed to inform you that our clients will be demolishing the existing road on their land for reconstruction and you are adviced to seek new passage to your land immediately." By 16 November 1994 the defendant had demolished part of the common driveway.

Learned Counsel for the plaintiffs informed the Court that by a letter dated 12 December 1994 the Assistant Collector of Land Revenue had not granted the request for a right of way.

He also submitted that we have now reach a situation where the plaintiffs can no longer obtain access to their house except on foot.

The plaintiffs have enjoyed this driveway ever since they purchased their property in 1981. The driveway serves as the only means of access to their property and they are claiming a right of easement over the defendant's land. In support learned Counsel for the plaintiffs cited the case of *Tam Kam Cheong v. Stephen Leong Kon Sang* [1980] 1 MLJ 36 where at p. 38 Salleh Abas FJ (as he then was) stated:

> For a claim of easement to be established, every easement must possess four characteristics, i.e.,
>
> (1) There must be a dominant and servient tenement;
>
> (2) An easement must accommodate the dominant tenement, i.e., appurtenant to it and connected with the normal enjoyment of the dominant tenement;
>
> (3) Dominant and servient owners must be different persons; and
>
> (4) An easement must be of such status as can be the subject-matter of a grant, i.e., its nature and extent should be capable of exact description.

And at p. 39 said:

> (See Cheshire *ibid.* pp. 448-454). In the case before us, despite the fact that property is owned by two different owners, the respondents and the appellant, and that the floors owned by the respondents could be treated as dominant tenements, whilst those owned by the appellant as servient tenements, nevertheless in law the property is just one single unit held under one title, i.e., Sandakan Town Lease No. 809. The case might be different if the Land (Subsidiary Title) Enactment 1972 of Sabah which was passed on 22 July 1972 as Enactment No. 9 of 1972 has been put into force. In our view the respondents' claim that they have an easement as regards the use of the common staircase must fail.

However learned Counsel for the defendant submitted that the claim of equitable right of way by the plaintiffs is not available in Malaysia by virtue of ss. 3(1) and 6 of the Civil Law Act 1956 and the National Land Code. She relied on the case of *Tan Wee Choon v. Ong Perk Seng* [1986] 1 MLJ 322.

In Sabah the relevant provision will be ss. 3(1) and 3(1)(b) of the Civil Law Act and the Land Ordinance.

On the contrary learned Counsel for the plaintiffs contended that English law and equity will not apply only if our own laws have made rules governing the same points. In *Tan Wee Choon's* case there is express provision under s. 282 of the National Land Code relating to easements, creation of easements and registration of easements and therefore this case cannot be used as authority in Sabah where under the Sabah Land Ordinance there are no similar specific provisions relating to easements and equitable rights.

I agree with the contention of learned Counsel for the plaintiffs that the case of *Tan Wee Choon v. Ong Peck Seng* does not apply to Sabah as there are no express provisions dealing with easements and equitable rights in the Sabah Land Ordinance.

Learned Counsel for the plaintiffs submitted that the case of *Tam Kam Cheong v. Stephen Long Kon Sang & Anor*. [1980] 1 MLJ 36 in which the four requirements for a claim to an easement of a right of way are clearly stated and recognised as being available in Sabah. That is a 1980 decision and was decided well after the provisions of the Civil Law Act 1956 were enacted.

Therefore it will require a serious consideration whether or not in view of the legal principles involved and the provisions of the Civil Law Act 1956 that the plaintiffs will finally succeed. And that raises a serious question fit for final determination.

I am of the view that whether ss. 3(1)(a) and 6 of the Civil Law Act 1956 remains applicable to our instant case or not, there being nothing in the Sabah Land Ordinance restricting the applicability of the equitable rights of easement, raises a serious question to be tried.

Learned Counsel for the defendant contended that s. 31(1)(d) of the Sabah Land Ordinance read with ss. 3 and 6 of the Civil Law Act does not allow for an easement of right of way in Sabah.

Learned Counsel for the plaintiffs reply is that s. 31(1)(d) of the Sabah Land Ordinance is a statutory provision relating to the right of a collector to grant a right of way over land belonging to persons owning country land.

It relates to lands to what may be termed land locked properties in the sense that the right of way must be to the nearest public road or a river or a fore shore.

It is his submission that a proper reading of s. 31(1)(d) of the Sabah Land Ordinance does not mean there cannot be any other way in which a person can claim a right of way over his neighbours' land.

In this case they are pursuing their rights under the common law and equity. Ours is a developing law in both common law principles and equity and learned Counsel stated the present case is one such case in the development of our common law and equity. And it is on that premise that he submitted that s. 41(2) of the Sabah Land Ordinance will not apply in our case.

And he submitted that the Court will still have the power and jurisdiction to grant the relief sought.

The issue whether s. 31(1)(d) of the Sabah Land Ordinance read with ss. 3 and 6 of the Civil Law Act does or does not preclude the application of common law principles and equity relating to an easement of right of way in Sabah raises a serious question to be tried.

Learned Counsel for the defendant contended that the register on the servient land does not show the plaintiffs' alleged right to the driveway in dispute. Instead what is registered is a different right of way.

She also contended that the plaintiffs' omission in not protecting their alleged interest means that they are now precluded from insisting on their alleged interest as against the defendant who is a *bona fide* purchaser of the land. There is nothing in the sale and purchase agreement dated 20 April 1992 (Exhibit "PO1") that refers to any alleged right of way granted to the plaintiffs. In support the case of *Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor*. [1967] 2 MLJ 104 was cited and also case of *Bhagwan Singh & Co. Sdn. Bhd. v. Hock Hin Bros. Sdn. Bhd.* [1987] 1 MLJ 324 where at p. 327 the Court held that the omission to put in a caveat was negligence sufficient to postpone the applicant's priority.

In our case learned Counsel for the plaintiffs submitted that the plaintiffs are not relying on priorities and caveats. So the two authorities cited are inapplicable. The plaintiffs are claiming an easement of right of way through the driveway.

Learned Counsel for the defendant submitted that "AAR5" and "AAR6" clearly shows that whatever arrangements made between them was personally to the two of them and only granted a license to use the driveway. Such license does not bind the defendant and once the defendant revokes the license then the plaintiff becomes a mere trespasser. Case of *Tee Than Song v. Caltex Oil Malaysia Ltd.* [1970] 1 MLJ 68 was cited. Therefore it is submitted no injunction can be granted to the plaintiffs.

But Learned Counsel for the plaintiffs submitted that if *Tee Than Song v. Caltex Oil Malaysia Ltd.* [1970] 1 MLJ 68 were to be decided today the decision will probaly change because it relied heavily on the English case of *Thomson v. Park. Thomson v. Park* is no longer good law because the later cases refused to follow it.

He cited the case of *Verrall v. Great Yarmouth Borough Council* [1980] 1 ALL ER 839 where at p. 844 Lord Denning MR said:

> So I hold that the observations in *Thomson v. Park* are no longer law.

At p. 848 and 849 Cumming Bruce LJ said:

> I take the view that it is open to this Court to review critically the ratio in *Thomson v. Park...*, it is now quite clear law that the proposition on which Counsel for the council depended, drawn from *Thompson v. Park* [1944] 2 ALL ER 477 is no longer to be regarded as the law.

Learned Counsel for the plaintiffs also submitted the plaintiffs' case is not made out on licence but on an easement of a right of way.

Learned Counsel for the defendant submitted that the defendant has no notice of the plaintiffs alleged right.

Learned Counsel for the plaintiffs submitted that the defendant knew of the use of the driveway by the plaintiffs *vide* para. 9 of the statement of claim.

The defendant's own affidavit shows that the house was purchased on 20 April 1992 and it was only in March 1994 that the defendant commenced the works. So from the period 20 April 1992 to March 1994 the defendant must have known of the use of the common driveway.

The sales and purchase agreement was made on 20 April 1992 between the defendant and the vendor. Before deciding to purchase the said land the representatives of the defendant must have visited the said land a few times to view the said land together with the building erected thereon. Mr. Peter Ong must therefore be aware that the occupiers of the dominant tenement were using the common driveway by vehicle to go to their land. He must have noticed that the common driveway leads to the dominant tenement and would have seen that the occupiers of the dominant tenement were using the common driveway. And very likely he must also have made enquiries about the use of the common driveway by his next door neighbour.

As a prudent buyer he would have asked the vendor about the common driveway. I am of the view he would have asked the vendor and was most probably told about the common driveway which was used by the occupiers of the dominant tenement. The purchase price is RM200,000 which is a large amount. Therefore he would have made enquiries about the use of the common driveway by the occupiers of the dominant tenement.

Now to say that Mr. Peter Ong has no knowledge of the use of the common driveway by his immediate neighbour I find it difficult to accept such a statement.

Therefore there is a serious question to be tried whether the claim of an easement of right of way binds the defendant.

The learned Counsel for the defendant submitted that the plaintiffs knew about the defendant's intention to demolish the driveway since March 1994. Had the plaintiffs wanted to maintain the driveway they could have obtained an injunction before the excavation. After delaying in seeking the Court's assistance they are now asking the Court to re-instate the driveway. In the premises learned Counsel for the defendant submitted that the balance of convenience lies in favour of the defendant.

On the other hand learned Counsel for the plaintiffs submitted that the plaintiffs did not know that the driveway was going to be demolished in March 1994. Exhibit "AAR11(a)" shows that there is an existing driveway not that the driveway is going to be demolished. In Exhibit "AAR8" dated 20 October 1994, the last paragraph states "we are instructed to inform you that our clients will be demolishing the existing road on the land."

Within less than a month by 17 November 1994 the plaintiffs had come to Court for protection. So there was no delay by the plaintiffs to come to Court. The case of *Lim Hean Pin v. Thean Seng & Co. Sdn. Bhd.* [1992] 2 MLJ 10 was cited. At pp. 25 and 26 His Lordship Edgar Joseph Jr. J (as he then was) said:

> It is settled law that delay on the parts of the plaintiffs in seeking an interlocutory injunction 'may be calculated to throw considerable doubt upon the reality of his alleged injury' (per Lord Chelmsford LC in *Ware v. Regent's Canal Co.* [1858] 44 ER 1250 at p. 1257 and hence may be of importance when the balance of convenience is being determined. But much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances... It follows, therefore, that delay on the part of a plaintiff, although it may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances.

I am of the view that there was no delay on the part of the plaintiffs to apply for the injunction.

I agree with the submission of learned Counsel for the plaintiffs that the fact that the plaintiffs' garage stands on road reserve is not relevant to the present application in that if there is encroachment on a road reserve it would be either the JKR or KKMC responsibility to take action in respect thereof.

I am of the view that the facts discloses a *bona fide* serious issue to be tried. What I have to consider next is the question of the balance of convenience.

The defendants have demolished most of the driveway. The defendants have also barricaded the driveway thereby denying the plaintiffs access to their property. Since no vehicles can pass through the driveway the plaintiffs have to park their car at the bottom of the hill and walk up a steep slope to reach their house. The demolition of most of the driveway had adversely interfered with the plaintiffs use and enjoyment of their house. They cannot drive right up into their house. Now they can only go to their house on foot.

And learned Counsel for the plaintiffs submitted that the plaintiffs are using the house as a residence. His tenant left because of the inconvenience. The plaintiffs are now also forced to leave the house. A man's home is his castle and to be forced to abandon your own castle is demoralising.

To the plaintiffs the driveway serves as the only access of necessity for all purposes i.e., entry and exit by vehicle. In the event of an emergency e.g. fire or illness there will be no access to the plaintiffs' home to fire brigade or ambulane. In such an event the consequences are dire and disastrous to the plaintiffs.

On the other hand the defendant does not at the moment live on their land as the house has been demolished and a new house is in the process of being constructed. The defendant's stand to demolish the driveway is that they have a legal right to do so and not because of inconvenience. Further if the defendant is ordered to restore the driveway, the inconvenience caused to them will be minimal as construction works can still continue as the defendant is using the driveway as access to their land.

The plaintiffs were in actual use of the driveway at the time the acts complained of took place and the deprivation of this use is a direct inconvenience to the plaintiffs with immediate consequence whereas the defendant is in the position of trying to stop that use not because of inconvenience but because of an alleged legal right.

Learned Counsel for the plaintiffs cited the case of *Chan Jen Chiat v. Allied Granite Marble Industries Sdn. Bhd.* [1994] 3 MLJ 495 where there was necessity for protecting the plaintiff's ponds as the livelihood of the plaintiff depended on these ponds which were under threat from the defendant's earthworks in the adjoining land and the Court there granted an interlocutory mandatory injunction in favour of the plaintiff.

In view of the aforesaid I am of the opinion that the balance of convenience lies in favour of the plaintiffs rather than the defendant.

The next issue I have to decide is whether damages is an adequate remedy.

Learned Counsel for the defendant submitted that nowhere in the plaintiffs' affidavit has the deponent sworn that this is his family home in which they are permanently and always staying. The house has been rented out at least until March 1994 and after this date the deponent

says that he returned from Australia and took over the house. She contended that the damage that would be suffered is at the most a loss or a diminution of rental which can easily be quantified.

On the other hand learned Counsel for the plaintiffs submitted that as a landlord it is reasonable and normal you either live in your own house or you rent it out. But where is the liveability or rentability of a house if there is no vehicular access to it.

I am of the view the issue here is whether the plaintiffs or their tenants can have vehicular access to the plaintiffs house or not irrespective of whether the plaintiffs are living there permanently or not.

Although a right of way has been endorsed on the title *vide* memorial No. 87163, that was never used because according to Exhibit "AAR5" it was inaccessable in view of contour of the land. If this access i.e., the common driveway is demolished and denied to the plaintiffs, there will be diminished value to the plaintiffs' land and the house will not be worth living in. The damage suffered by the plaintiffs will be irreparable.

The loss suffered here is loss of direct access by car to the plaintiffs' house. Further the plaintiffs would suffer anxiety of whether in the case of an emergency whether their house will be safe or not. I am of the view that damages will not be an adequate remedy.

But if the defendant succeeds at the trial damages will be an adequate remedy. The Court can order the plaintiffs to make good any damage sustained by the defendant. This can be quantified as to the cost of restoration and demolition of the restoration.

In the event that the plaintiffs succeed at the trial damages will not be an adequate remedy as there is no other access to the plaintiffs' house except for the driveway through the servient tenement.

Mandatory injunction is only granted in exceptional and extremely rare case - (See *Wah Loong (Jelepang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 111 and *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150).

In our instant case the plaintiffs have enjoyed the right of way over the defendant's land since 1981 without any interruption or objection from the previous owners of the servient tenement.

Since the injunction obtained on 17 November 1994 has been too late to prevent the demolition of most part of the driveway, there is an urgent need for the driveway to be restored. Without the common driveway, the plaintiffs will have to walk everyday up a steep slope through a narrow path to their house.

To protect themselves from the sun and rain they have to use umbrellas. They would most likely get wet on rainy days. They are thus suffering inconvenience and great hardship.

I am of the view that this is an exceptional and extremely rare case whereby an interlocutory mandatory injunction should be granted because the only access for vehicles is through the driveway.

I now come to the issue of preservation of the *status quo* pending trial.

Learned Counsel for the defendant submitted that the situation at present is that the disputed driveway has been excavated and that is what is the *status quo.* However learned Counsel for the plaintiffs submitted that the *status quo* is not what we find today but what prevailed

at the time when the matters complained of took place. The case of *Fellowes v. Fisher* [1975] 2 ALL ER 830 at p. 843 was cited "By the expression *'status quo'* I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained."

In *Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors.* [1992] 1 MLJ 487 His Lordship Edgar Joseph Jr. J (as he then was) at p. 504 said:

> Firstly, it is only right to say at the risk of being trite, that the general purpose of an interlocutory injunction, whether prohibitory or mandatory, is to preserve the *status quo* in as equitable a manner as the circumstances permit pending the final disposal of the trial. The *status quo* in this sense may mean that prevailing at the time of the application or just before the wrongful acts complained of occurred.

I am of the view that the *status quo* to be preserved should be the existence of the driveway before it was partly demolished.

In view of the foregoing I granted the plaintiffs' application for the following orders:

1. an extension to the order for interim injunction dated 17 November 1994 obtained by *ex-parte* summons in chambers application dated 17 November 1994;
2. a mandatory order that the defendant whether by themselves, their servants, agents or otherwise howsoever do restore that portion of the driveway which has been demolished on the servient tenement to allow vehicular access to the plaintiffs' house in the dominant tenement;
3. the plaintiffs undertake to abide by any order the Court or Judge may make as to damages in case the Court or Judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the orders sought herein which the plaintiffs ought to pay;
4. that the cost of this application be paid by the defendant.